Supreme Court, U.S.
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No. 85-1202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALBERTA BRADFORD, Executrix of the Estate of Alex E. Bradford, Deceased,

Petitioner,

—v.—

BLUE PEARL MUSIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PITNEY, HARDIN, KIPP & SZUCH
163 Madison Avenue, CN 1945
Morristown, New Jersey 07960
(201) 267-3333

SEAN R. KELLY, ESQ.
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a District Court may lawfully exercise discretion to grant a plaintiff's application under Fed. R. Civ. P. 60(a) to correct an "oversight or omission" in a judgment to identify the defendant as a judgment debtor in the defendant's individual capacity as well as in the defendant's fiduciary capacity, where the Complaint specifically asserted claims against the defendant individually, where the defendant was served and where the defendant had actual notice of the proceedings.

2. Whether a District Court may lawfully exercise discretion in vacating an Order on Remand prepared by one party and substituting an Order on Remand prepared by the other party as reflecting more accurately the Judgment of the Court of Appeals.

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OPINIONS AND JUDGMENTS BELOW

Neither the District Court's Order and Judgment dated November 2, 1984, correcting an error in the prior judgments as to the identity of the judgment debtor, nor the opinion underlying the Order and Judgment is either published or included in petitioner's appendix.

Neither the District Court's Order on Remand dated October 30, 1984, nor the prior Order on Remand dated September 24, 1984 for which it was substituted is either published or included in petitioner's appendix. The District Court gave no opinion in connection with its entry of the Orders on Remand.

The Judgment of the Court of Appeals affirming the District Court's Orders is neither published nor included in petitioner's appendix. The memorandum opinion of the Court of Appeals is included in petitioner's appendix at (A. 1), and the Order Denying Rehearing is included in the appendix at (A. 13).

An opinion of the Court of Appeals on a prior appeal in this matter, which is not legitimately the subject of the petition, is published at 728 F.2d 603 (1984), and is included in the appendix at (A. 35).

COURT RULE INVOLVED

Federal Rule of Civil Procedure 60(a):

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

SUMMARY OF ARGUMENT

Respondent brought this copyright infringement action against petitioner in her individual capacity and in her capacity as fiduciary of her late husband's estate. The merits of the copyright infringement claim were adjudicated in favor of respondent in a prior appeal in this case, 728 F.2d 603 (3d Cir. 1984) ("*Blue Pearl I*"), which affirmed respondent's judgments against petitioner for injunctive relief and damages, but vacated the injunction "insofar as it requires Mrs. Bradford to 'recreate' her deceased husband's copyrighted works." (A. 35-41.)

Petitioner thereafter appealed to the Court of Appeals from (1) the District Court's Order on Remand, and (2) the District Court's Order and Judgment correcting the underlying judgments specifically to include "Alberta Bradford, individually"

as a judgment debtor. The Court of Appeals issued a Judgment affirming both Orders. The Petition herein seeks review of that Judgment.

We show in this brief that the issues petitioner asks this Court to review in no way arise from the Judgment of July 22, 1985, but rather that petitioner belatedly seeks review of issues of copyright ownership which were settled in *Blue Pearl I*. We also show that the District Court's employment of Fed. R. Civ. P. 60(a) to correct "errors [in the underlying judgments] arising from oversight or omission" is a textbook illustration of the appropriate use of that Rule presenting no controversial or significant issue for review. The District Court's substitution herein of one form of Order on Remand in preference to another represents a garden variety exercise of judicial discretion, again presenting no issue of significance to merit review by certiorari.

STATEMENT OF THE CASE

The District Court had subject matter jurisdiction over this case pursuant to the Copyright Laws of the United States, 17 U.S.C. § 110 *et seq.*, and the jurisdictional provisions of 28 U.S.C. § 1338, and the Court of Appeals had jurisdiction over the matter as an appeal from final judgments of a District Court in accordance with 28 U.S.C. § 1291.

The late Alex Bradford was a composer of gospel music, including the Broadway hit "Your Arm's Too Short to Box with God." (A. 1-2, 35.) By assignment from Mr. Bradford, respondent acquired all rights to Mr. Bradford's compositions. (A. 2, 37.)

This action arose out of petitioner's continuing infringements of respondent's copyrights to the late Mr. Bradford's compositions. (A.2.) Although the caption of the Complaint erroneously named as defendant only "Alberta Bradford, as Executrix of the Estate of Alex E. Bradford, Deceased," the allegations set forth in the Complaint expressly and unam-

biguously stated copyright infringement claims against petitioner personally. (A.5.) Indeed, throughout the Complaint, petitioner was specifically identified as a party defendant both in her individual and fiduciary capacities. Similarly, each paragraph of the *ad damnum* to the Complaint requested relief from infringements by "Alberta Bradford, Individually and as Executrix." (A. 5-6.)

Respondent served its Complaint upon petitioner, and she defaulted. (A. 2-3.) The District Court thereupon entered a Final Order and Judgment for injunctive relief, enjoining petitioner from further infringement of respondent's copyrights and ordering a proof hearing as to damages. (A. 3, 37-38.) The judgment for injunctive relief made no reference to any infringing acts by the Estate of Alex Bradford or by petitioner acting in her fiduciary capacity as representative of the Estate, but simply enjoined "defendant Alberta Bradford" from further infringements and ordered a hearing to fix damages arising out of infringements by "defendant Alberta Bradford."

Following a proof hearing, a magistrate issued a Report and Recommendation on November 20, 1981, concluding that respondent had established seven separate infringements by petitioner and that on each occasion petitioner had willfully infringed respondent's copyright. (A. 3, 38.) Like the judgment for injunctive relief, the Report and Recommendation made no reference to any infringing acts by petitoner in her fiduciary capacity, but referred only to her infringing acts as an individual. The District Court adopted the Report and Recommendation and entered a Judgment for statutory damages in favor of respondent. (A. 3, 38.)

Petitioner thereafter moved to vacate both the judgment for injunctive relief and the judgment for damages. (A. 3, 38.) In an affidavit submitted by petitioner in support of her motion to vacate, she acknowledged her awareness that the action was directed against her personally:

> 14. I have since been advised by my present attorney that the nature of this present action *against me*

> is for performing and licensing others to perform Alex's works.

(Emphasis added.)

In its opinion denying petitioner's motion to vacate the judgments, the District Court again made no reference to any infringements by or claims against the Estate, but rather addressed the action according to the substance of the allegations—*i.e.*, as an action against petitioner personally. In reciting the procedural history of the case, the District Court simply stated:

> On February 27, 1981, Blue Pearl filed suit *against Alberta Bradford*, claiming continuing infringement of Blue Pearl's copyright to Mr. Bradford's compositions.

(Emphasis added.)

Petitioner thereafter moved for reconsideration of the District Court's denial of her motion to vacate. In support of her motion, petitioner submitted an affidavit which further demonstrated her awareness that the action was directed against her personally, and not merely against the Estate:

> [G]iven the opportunity, I can claim and prove what is rightfully mine. The Court has ordered me to tell the world that Blue Pearl is the owner of Alex's music, but there are rights which I have in the music as a co-creator that I do not feel that I must forfeit.

(A. 29-30.) The District Court denied petitioner's motion for reconsideration.

On appeal, the Court of Appeals affirmed the denial of petitioner's motion to vacate, but vacated that portion of the District Court Order which compelled petitioner to recreate certain copyrighted works that had been lost. (A. 4, 39-42.) As in the opinions of the District Court, the opinion of the Court of Appeals addressed respondent's claims as running against petitioner personally rather than merely against the Estate. (A. 35-42.)

The Court of Appeals thereupon entered Judgment (not included in petitioner's appendix) on March 5, 1984 (1) affirming the denial of the motion to vacate, (2) vacating the injunction insofar as it required petitioner to recreate certain copyrighted works, and (3) taxing costs in favor of respondent. On September 24, 1984, the District Court entered an Order on Remand (not included in petitioner's appendix) prepared by petitioner's attorneys which purported to adjudicate various legal issues relative to the opinion issued by the Court of Appeals, such as the collateral estoppel effect of the rulings of the Court of Appeals and the finality of certain orders in prior litigation in the State and Federal Courts. On October 30, 1984, the District Court entered a substitute Order on Remand (not included in petitioner's appendix) prepared by counsel for respondent, vacating the prior Order on Remand and implementing the three directives set forth in the Judgment of the Court of Appeals dated March 5, 1984.

Notwithstanding the affirmance of the Judgments against her, petitioner continued to assert that the Judgments did not bind her because the caption did not include the modifier "individually." Respondent therefore moved before the District Court pursuant to Fed. R. Civ. P. 60(a) to correct the prior Judgments to specifically include petitioner as a judgment debtor in her individual capacity as well as in her fiduciary capacity. (A. 4-5.) The District Court granted the motion by Order and Judgment dated November 2, 1984 (not included in petitioner's appendix), setting forth its reasoning in an opinion of even date (not published or included in petitioner's appendix).

On November 29, 1984, petitioner filed a single Notice of Appeal from the District Court's second Order on Remand dated October 30, 1984, and from the District Court's Order and Judgment dated November 2, 1984. The Court of Appeals affirmed both Orders by Judgment (not included in petitioner's appendix) and Opinion (A. 1-12), both dated July 22, 1985.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE THE QUESTIONS PRESENTED IN THE PETITION

Petitioner asks this Court to review a Judgment (not included in petitioner's appendix) entered by the Court of Appeals on July 22, 1985. That Judgment affirmed Orders of the District Court (1) correcting a technical error in the prior District Court Judgments pursuant to Fed. R. Civ. P. 60(a), and (2) entering respondent's form of Order on Remand in preference to the form submitted by petitioner. The Petition, however, does not address these two narrow issues, but rather addresses the fundamental substantive issue of ownership of the copyrights to the late Mr. Bradford's musical works—an issue that was adjudicated in favor of respondent in 1984. (A. 35-42.) As such, the Petition represents an untimely attempt to seek review of closed questions.

A reading of petitioner's "Questions Presented" reveals that Questions 2, 3 and 4 plainly do not arise from the Court of Appeals' decision of July 22, 1985 (A. 1-12), but rather from the 1984 decision by that Court on the earlier appeal (A. 35-42). Question 2, which pertains to the collateral estoppel or res judicata effect of certain prior litigation, arises from the Court of Appeals' discussion of the prior litigation in *Blue Pearl I.* (A. 37, n. 2.) Manifestly, the July 22, 1985 Judgment, which relates solely to the correction of a technical error in the prior Judgments and the entry of an appropriate Order on Remand, presents no such issue.

Question 3 challenges the fundamental substantive determination in this case to the effect that respondent, and not petitioner, owns the copyrights to the late Mr. Bradford's works. That issue was squarely decided in favor of respondent in *Blue Pearl I.* (A. 37.) The later Judgment of July 22, 1985 does not raise the issue of copyright ownership, but only the

issue of the legal identity of the infringer. Petitioner's attempt to seek review of the decision against her on the issue of copyright ownership is untimely.

Question 4, which relates to petitioner's exposure to contempt sanctions, simply is a non-issue, arising neither from the earlier nor the later decision of the Court of Appeals. Indeed, in the final footnote to its July 22, 1985 opinion, the Court of Appeals expressly disclaimed any intention to address that issue. (A. 11.) Respondent has repeatedly acknowledged, and here acknowledges again, that petitioner has discharged the obligations that were the subject of the contempt Order.

Only Question 1 of petitioner's "Questions Presented" speaks even remotely to the issues raised by the July 22, 1985 Judgment, and even Question 1 grossly misrepresents the factual and procedural background. Question 1 challenges the District Court's exercise of its discretion under Fed. R. Civ. P. 60(a) to correct an "oversight or omission" in the captions of the earlier Judgments "[w]here a defendant was not personally named or personally served . . . . without notice, hearing or examination." In fact, petitioner was personally named as the defendant copyright infringer numerous times throughout the Complaint (A. 5), petitioner had notice of her personal liability (A. 6), and petitioner was given an opportunity for a hearing, but waived that opportunity by her own dilatory conduct (A. 39).

Because none of the four Questions presented by petitioner arises from the Judgment at issue, the petition should be denied.

II. NO REASON EXISTS FOR THIS COURT TO EXERCISE ITS CERTIORARI JURISDICTION

Although petitioner has failed to provide the Court with several of the essential elements of the record below, it is apparent from the opinion of the Court of Appeals (A. 1-12) that the Judgment from which the Petition arises relates solely to the District Court's exercise of its discretion in (1) correcting a technical error in the prior Judgments, and (2) entering one Order on Remand in preference to another. Manifestly, neither aspect of the Judgment presents the sort of "special and important reasons" meriting review by certiorari. See Sup. Ct. R. 17.1.

A. Because Petitioner, in Her Individual Capacity, Was at All Times a True Party Defendant, the District Court Properly Ordered that the Judgments Against Petitioner "As Executrix" Be Corrected to Include Petitioner "Individually" as a Judgment Debtor

This Court has recognized that the correction of a judgment under Rule 60(a) is not a mere instrument of convenience, but a valuable substantive right. "It is axiomatic that courts have the power *and the duty* to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake . . . . Rule 60(a) of the Federal Rules of Civil Procedure recognizes this power . . . ." *American Trucking Association v. Frisco Transportation Co.*, 358 U.S. 133 (1958) (emphasis added).

The District Court granted respondent's motion here to correct a misnomer that originated in the erroneous caption of the pleadings and thereby found its way into the judgments. Several other circuits have employed the Rule to provide relief where, as here, evidence of the inadvertence was apparent from the record. *See, e.g., Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) (correction of judgment to reflect denial of request for costs more properly considered

motion invoking relief under Rule 60(a) as opposed to Rule 59(e) permitting parties to move to alter or amend judgments); *Chavez v. Balesh*, 704 F.2d 774, 776-77 (5th Cir. 1983) (District Court's failure to include award of liquidated damages in judgment constituted "mere oversight" and Court's subsequent correction of judgment was proper exercise of its authority under Rule 60(a)); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246-47 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984) (party's motion to correct judgment to reflect assessment of costs was timely and District Court had authority to grant relief requested inasmuch as Rule 60(a) has no time limit and assessment of costs as set forth in Court's order had been inadvertently omitted by clerk); *Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224, 225-26 (10th Cir. 1980) (District Court properly exercised discretion to act upon own initiative in correcting amount of compensatory damage award where amount awarded from bench constituted inadvertent misstatement apparent from the record); *Pattiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968) (Court's entry of amended complaint on clerk's docket to correct its omission held proper where pleading had been in clerk's posssession unknowingly and parties had intentionally stipulated to dismiss the cause asserted therein rather than cause asserted in original complaint); *Jackson v. Jackson*, 276 F.2d 501, 502-503 (D.C. Cir. 1960) (District Court acted within its authority in correcting judgment to reflect obligation of father to provide maintenance for children only when children were in jurisdiction where such was the intent of the court and the understanding of the parties).

Further, as noted by both the District Court and by the Court of Appeals below, this case is virtually indistinguishable from *Fluoro Electric Corp. v. Branford Associates*, 489 F.2d 320 (2d Cir. 1973). There, defendant appealed from a District Court order granting the judgment creditor's motion under Rule 60(a) to correct the misidentification of the judgment debtor from "Branford Associates, a corporation" to "Branford Associates." Defendant argued there that plaintiff sued

only a particular corporate defendant; that the judgment ran solely against the corporate defendant; and that Rule 60 should not be utilized, under the guise of correcting a misnomer, to substitute a new party defendant which was never involved in the controversy at issue, which was never served and which never had its day in court. Defendant further argued, as petitioner does, that plaintiff's motion to correct the judgment arose merely from plaintiff's discovery of the limited assets of the entity formally named as the judgment debtor. *Id.* at 323-24.

In affirming the District Court's granting of plaintiff's motion to correct the judgment in *Fluoro Electric*, the Court of Appeals observed that plaintiff intended to and did bring suit against the other party to the controversy, regardless of the legal structure of that other party, and that that other party was substantively the same entity regardless of formal denomination:

> There was, therefore, no error in . . . directing the clerk to delete the words "a corporation" from the defendant's name in the judgment. Had this been corrected earlier, no other persons would have been served in the action. No others would have appeared before the Court. It was properly the correction of a misnomer under Rule 60(a).

Id. at 325-26. *See also*, *Silas v. Paroh Steamship Co.*, 175 F. Supp. 35 (E.D. Va. 1958), *vacated on other grounds*, 276 F.2d 857 (4th Cir. 1960) (where default judgment was entered against corporation erroneously named as a "Company," misnomer of judgment debtor correctible under Rule 60(a)); *Anderson v. Brady*, 6 F.R.D. 587 (E.D. Ky. 1947) (default judgment against "Commercial Bank" corrected to read "Commercial Deposit Bank" where proper party was in fact served).

The factors cited by the Court of Appeals in *Fluoro Electric* are equally applicable here, and compel the same result. Like the plaintiff in *Fluoro Electric*, respondent Blue Pearl expressly

stated in its Complaint and in all subsequent pleadings, briefs and hearings that its copyright infringement claim was directed against petitioner personally. Petitioner and her counsel fully understood that, as did the District Court and the Court of Appeals. As in *Fluoro Electric*, had the misnomer here been corrected earlier, no other persons would have been served, and no others would have appeared. A purely technical error in the caption of the pleadings should not operate to deprive respondent of the benefit of its injunctive relief and award of money damages. The District Court therefore correctly exercised its discretion in correcting the judgments, and its Order to that effect was correctly affirmed by the Court of Appeals.

B. The District Court Correctly Vacated the Improper Order on Remand Submitted by Petitioner and Substituted the Order on Remand Submitted by Respondent

Petitioner complains that the Order on Remand prepared by her attorneys, which originally was entered by the District Court, was shortly thereafter vacated by the Order on Remand submitted by respondent. In vacating petitioner's Order and substituting respondent's, the District Court merely acted in accordance with the Judgment of the Court of Appeals.

The Judgment of the Court of Appeals in *Blue Pearl I* (not included in petitioner's appendix) expressly provided as follows: (1) the denial of petitioner's motion to vacate the judgments against her was affirmed; (2) the District Court's Order dated March 29, 1983 was vacated insofar as it required petitioner to "recreate" certain copyrighted works; and (3) costs were taxed in favor of respondent. The Order on Remand prepared by respondent followed practically verbatim the language of the Judgment of the Court of Appeals, and was properly entered by the District Court.

As noted by the Court of Appeals (A. 7-11), the Order on Remand prepared by petitioner's attorneys was seriously inaccurate in at least three respects: (1) it purported to limit respondent's copyrights to two specific musical works, whereas

the Court of Appeals had held that respondent acquired the copyrights to all of Mr. Bradford's compositions; (2) it purported to adjudicate the collateral estoppel effect of certain prior litigation between the parties; and (3) it purported to vacate in its entirety one of the District Court Orders at issue in the prior appeal, whereas the Court of Appeals had specifically directed that the Order be vacated only in part.

The Court of Appeals having set forth in its earlier Judgment the three simple directives enumerated above, it became the duty of the District Court to enter an Order on Remand in conformity with the Judgment, without the embellishment petitioner desired. The Order submitted by respondent and ultimately entered by the District Court did just that, and therefore was properly affirmed. Because petitioner cannot direct the Court's attention to any authority inconsistent with such a manifestly appropriate exercise of judicial discretion, there simply are no "special or important reasons" justifying certiorari.

CONCLUSION

For the foregoing reasons, respondent Blue Pearl Music Corporation respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

PITNEY, HARDIN, KIPP & SZUCH
Attorneys for Respondent
Blue Pearl Music Corporation

SEAN R. KELLY, ESQ.
Counsel of Record

DATED: February 20, 1986